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Supreme Court
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AUG 9 1971
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IN THE

Supreme Court of the United States

No. 70-356

JOSEPH L. GORDON,

Petitioner,

v.

JAMES K. ADCOCK,

Respondent.

REPLY MEMORANDUM TO RESPONDENT'S MEMORANDUM IN OPPOSITION

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Washington, D. C. - TIMES PRESS - 202 - 269-6828

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The Petitioner prays that his petition be not denied on the ground that it was filed out of time. Petitioner earnestly pleads to the Court that the filing error was purely that, a totally innocent and inadvertent error. It was inadvertently assumed that March 30th was the last day of the month. It was believed that the last filing day was June 30, 1971, three months later—that the 90 days limit and 3 months were equally equated.

Pursuant thereto, the draft of the brief was in the hands of the printer on June 28, with filing to be made on June 30th. Proofs were examined on the morning of the 29th of June. However while on the way to lunch on the same day, the realization of the error struck counsel, and he immediately communicated with the printer. Thereafter, counsel spent the greater part of the afternoon of the 29th with the printer and sometime after 4 p.m. raced to the Supreme Court for filing. In support thereof counsel has appended affidavits of two employees of the printer, at appendix, p. 1a-2a.

That equating 90 days with three months is a natural reaction, we call attention of the Court to the respondent's own citation of *Department of Banking v. Pink*, 317 U.S. 264, 268. There too the Court used the measure of three months rather than 90 days when it said:

> "Where the order of judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for the purposes of review is established."

Furthermore, this Honorable Court has shown a disposition to construe the statute of Title 28, Section 2101(c), with liberality and leniency. In the case of *Union National Bank of Wichita Kansas v. Lamb*, (Mo. 1949), 69 S.Ct. 911, 337 U.S. 38, 93 L.Ed. 1190, the petition was filed on the 91st day, the 90th day falling on a Sunday. There the Court held that

> "Rule 6(a) of the Federal Rules of Civil Procedure, provides that where the last day for performance of an act falls on a Sunday or legal holiday, performance on the next day which is not a Sunday or a legal holiday is timely. That rule provides the method of computation of time prescribed or allowed not only by the rules or by order of the court, but by any other applicable statute. Since the rule had the concurrence of Congress, and since no contrary policy is

> expressed in this statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable in 28 U.S.C. 2101(c)."

Now the petitioners in the *Union National Bank* case, supra, could have filed their petition on Saturday or the 89th day. Evidently they too were inadvertent, but luckily they were permitted the use of Sunday to carry them through and permit their petition to be accepted on the 91st day. The petitioner submits that there in in fact no difference between the *Union National Bank* case and the petitioner's in regard to the matter of time. Both were filed on the 91st day. However the Court in the *Union National Bank* case utilized Rule 6(a) of the Federal Rules of Civil Procedure, when in fact those Rules do not govern the United States Supreme Court. The Federal Rules of Civil Procedure govern only the United States District Courts.

Petitioner respectfully submits therefore, that the Court in the *Union National Bank*, liberally and leniently construed 2101(c) in order to avoid a proper cause of action from being subjected to technical limitations. The Court said so, when it cited *Street v. United States*, 133 U.S. 209. In the *Street* case the Court said in treating a Sunday as a *dies non* that,

> "The intent of Congress is obvious, and all proceedings to carry such intent into effect should be liberally construed and not subjected to any such technical limitations as will thwart such obvious purpose."

Yet it must be remembered that there was nothing the statute in the *Street* case that provided, as does Rule 6(a) of the Federal Rules of Civil Procedure, to treat a Sunday or legal holiday as a *dies non*. It was merely utilized for carrying out the intended purpose of Congress "to transfer army officers from active duty and to fill vacancies in the active list on or before January 1, 1871 . . ." To do otherwise would be to "thwart such obvious purpose."

The Court in the *Street* case would have taken the same position even if the 90th day had not been a Sunday; even if on the 90th day an innocent, inadvertent error had occurred, as it occurred in this case. The intent of Congress should not be thwarted by a technical limitation.

Indeed a reading of the legislative history concerning the enactment of Title 28, Sec. 2101(c) reveals nothing at all to show that Congress in changing the 3 months requirement to 90 days, meant anything other than the same three months. The real change in the statute was for the purpose of eliminating reference to the Supreme Court of the Philippine Islands - the Philippines having become an independent sovereign nation.

The matter in controversy rings with great injustice. The petitioner has suffered substantial harm at the hands of the respondent. To permit the latter to profit at the expense of the petitioner, would indeed be a most lamentable conclusion to this controversy. The respondent falsely, knowingly and maliciously utilized what he believed to be the secret channels of government to the injury the petitioner and then sought the protection of *Barr v. Matteo.*

It is most respectfully submitted that the matter is one which should provide the Court the opportunity to set a more definitive boundary against officials who, as Judge Hand stated in *Gregoire v. Biddle*, 177 F.2d 579 (Cir. 1949), cert. den. 339 U.S. 949 (1950), "exercise a power dishonestly" and thus "overstep its bounds."

The Supreme Court of the United States is therefore humbly requested not to deny this petition on the grounds of being out of time; that it construe the governing statute liberally and leniently to avoid thwarting the intent of Congress to give the petition his day in Court.

Respectfully submitted,

Samuel I. Sherwood
501 13th Street, N.W.
Washington, D.C.
Attorney for Petitioner

APPENDIX

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

John K. Brewer, having been duly sworn, on oath deposes and says that: I reside at 8803 Trafalgar Court, Springfield, Va., and am production manager for Thiel Press, 1422 K Street, N.W., Washington, D.C.; that on June 28, 1971, Mr. Sherwood brought in a petition in rough for a Writ of Certiorari in Gordon v. Adcock; that we both agreed that the final date for filing was June 30, 1971, inasmuch as the date of judgment was March 30, 1971 from the U.S. Court of Appeals for the Ninth Circuit. We were both misled by the unfortunate March 30th date, both forgetting that March had 31 days as did May. The next day about noon, Mr. Sherwood phoned. He sounded terribly upset. He said that it had just crossed his mind that we had miscalculated and that the final filing date was the previous day —June 28th. It was just too bad because we could have still printed it on the previous day and it could have been filed on June 28th. Mr. Sherwood spent most of the afternoon of the 29th at our office in a terribly upset state waiting for the brief. As soon as it was ready he grabbed a taxi and raced for the court.

/s/ John K. Brewer

Subscribed and sworn to before me this 6th day of August, 1971.

/s/ Estelle Rubin
Notary Public, D.C.

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

Rozina W. Bailey having been duly sworn, on oath deposes and says: That I reside at 616 North Piedment Street, Arlington, Va.; that I am assistant production manager for Thiel Press, 1422 K Street, N.W., Washington, D.C.; that on June 28, 1971, Mr. Sherwood brought in a petition in rough for a Writ of Certiorari in Gordon V. Adcock; my boss Mr. Brewer told me that the final date for filing was June 30. In the morning of the next day, June 29, Mr. Sherwood called in to say that he and Mr. Brewer had miscalculated the time and that the petition should have been filed the previous day June 28, and spent most of the afternoon awaiting the printing of the brief. He was extremely upset. As soon as the petition was ready, he grabbed a taxi and raced for the Court. It is too bad because the brief could have been filed the same day. It was just an unfortunate inadvertance and miscalculation mostly because the date of the judgment was on March 30, causing one to put the 90 day mark on the same date 3 months later.

/s/ Rozina W. Bailey

Subscribed and sworn to before me this 6th day of August, 1971.

/s/ Estelle Rubin
Notary Public, D.C.